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Erika Hanson

Lighting the Way Towards Liberty: The Right to Abortion After *Obergefell* and *Whole Woman's Health*

by ERIKA HANSON*

Introduction

Women in the U.S. have overcome numerous obstructions to their advancement in society. Yet, despite evolving social and cultural views, women in many states still face ongoing state-sanctioned subordination and discrimination in the form of abortion restrictions. In order to take the next step for women's equality and dignity, abortion rights advocates must adopt a proactive legal strategy that will affirmatively guarantee abortion access for all women, especially those most often subjected to discrimination. Achieving this goal requires adopting comprehensive legal arguments that can be applied to definitively invalidate all abortion restrictions. In light of recent precedent, abortion rights advocates can employ sweeping legal arguments to clearly establish that a woman's choice regarding her bodily autonomy is essential, not only to her innate dignity and equality, but to the liberty guaranteed to her under the Fourteenth Amendment. This strategy will invalidate not just unconstitutional restrictions, but will also remedy the most invidious, discriminatory, and long-standing obstacles to women's equality by requiring the government to provide abortion coverage for women who receive their insurance through Medicaid.

The confluence of recent developments in both abortion rights jurisprudence and substantive due process jurisprudence has delivered the abortion rights movement a critical opportunity to claim every women's right to dignity, autonomy and equality, and to strike down the worst abortion restrictions once and for all. The 2016 Supreme Court decision in *Whole*

* National Women's Law Center; J.D. 2016, Washington University School of Law, St. Louis, Missouri. Special thanks to Alex Zuckerman for thinking through Justice Thomas' dissent in *Whole Woman's Health* and for his support and encouragement, Skip Hanson for his thoughtful editing, and Politics and Prose for the lovely workspace away from home. Institutional affiliations are for identification purposes only.

Woman's Health v. Hellerstedt, which reaffirmed the right to obtain an abortion, made clear that abortion restrictions cannot masquerade as policies theoretically protecting women's health,[1] and undermined an effective oppositional strategy to slowly erode the right to abortion.[2] The ruling in *Whole Woman's Health* has created a pivotal moment for the future of abortion rights. In response, abortion opponents have mounted an open assault on the right to abortion. To counter this, abortion rights advocates could continue to proceed with a state-by-state, restriction-by-restriction defense of the right to abortion, evidence being that this has abated the worst attacks on the right thus far. Alternatively, the abortion rights movement could eschew a reactionary stance in favor of a revolutionary one.

The reasoning and expanded understanding of liberty espoused by Justice Kennedy in *Obergefell v. Hodges*[3]—the case which recognized the right to same-sex marriage across the United States—illustrates how the core principles of autonomy, dignity, and equality strengthen all substantive due process rights, including the right to abortion.[4] Just as the states' actions in *Obergefell* deprived same-sex couples of their ability to make "intimate choices that define personal identity and beliefs" and denied them equality

1. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016).

2. *See* Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694, 1708 (2008) ("Initially, the [antiabortion] movement sought to overturn *Roe* with a Human Life Amendment but was unable to muster the support needed to amend the Constitution. With frustration mounting throughout the 1980s, one wing of the movement turned to clinic violence. Another began to develop strategies to reverse *Roe* incrementally, through legislation and litigation that would erode support for abortion one step at a time.").

3. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

4. The Fourteenth Amendment's doctrine of substantive due process protects some of our most basic and valued fundamental rights from government intrusion. Substantive due process requires the government to proffer a sufficient substantive reason to justify any deprivation of life, liberty, or property. U.S. CONST. AMEND. XIV, § 1; *see also* Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1501 (1999). Among the rights protected under substantive due process is the right to make personal decisions about family and parenthood with limited interference from the state. This right is deeply ingrained in modern constitutional law, as cases during the last century have established the right to direct the education of one's children, Meyer v. Nebraska, 262 U.S. 390, 400 (1923), the right to raise one's children as one sees fit, Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925), the right to procreate, Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942), the right to use contraception, Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (holding laws forbidding the use of contraception violated the privacy rights of married couples); Eisenstadt v. Baird, 405 U.S. 438, 443 (1972) (holding prohibitions on contraception violated single persons' rights under the Equal Protection Clause of the Fourteenth Amendment), and the right to sexual intimacy, Lawrence v. Texas, 539 U.S. 558, 578 (2003). Also included in this line of cases is the right to abortion, Roe v. Wade, 410 U.S.113, 153 (1973); Planned Parenthood v. Casey, 505 U.S. 833, 845–46 (1992); Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016), and the right to marry, Loving v. Virginia, 388 U.S. 1, 12 (1967), including same-sex marriage, Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015).

under the law,[5] state actions restricting a woman's right to abortion deprive her of her ability to determine the course of her life and fail to recognize that men and women have an equal claim to dignity under the Constitution.

The principle that connects *Whole Woman's Health* and *Obergefell* is deeper and more basic than the right to make decisions about family and personal relationships—these cases are built upon the right of all persons to live within a government structure in which the "State cannot demean their existence or control their destiny."[6] Therefore, the Fourteenth Amendment not only shields individuals from government intrusion, it also entitles them to a government structure that allows all persons to "participate equally in the economic and social life of the Nation,"[7] without regard to immutable characteristics such as race, sex, or sexual orientation. This principle is liberty. As *Obergefell* demonstrates, liberty requires that the government refrain from infringing upon an individual's fundamental rights, and that it affirmatively facilitates the realization of those very rights.

This Article advocates for reconnecting the right to abortion to the principles of liberty in the same way that marriage was linked to liberty in the marriage equality context. Such a strategy will fortify abortion jurisprudence and defeat all restrictions, including those denying low-income women public Medicaid coverage of abortion. The idea that women's equality and dignity are inextricably linked to their autonomy in making reproductive health decisions is the foundational premise of the abortion rights movement. This tenet can be realized in a viable legal strategy by broadly and explicitly tying the right to abortion to liberty, as expounded by the Supreme Court in other contexts.

This Article begins by reviewing the reasoning of Justice Kennedy in *Obergefell* and highlighting the unique way in which *Obergefell* clarifies substantive due process jurisprudence. Part II will apply the principles of *Obergefell* to a woman's fundamental right to decide whether to carry her pregnancy to term. Finally, Part III examines Justice Thomas' dissent in *Obergefell*, which criticizes Justice Kennedy's majority opinion as requiring proactive action on the part of the state to satisfy substantive due process. Part IV applies a theory of "fulfilled due process"—which requires state actors to respect fundamental rights, as well as facilitate their exercise—to abortion restrictions. Specifically, Part III concludes that under a fulfilled due process theory, not only are prohibitions on public funding of abortion coverage unconstitutional, but also that the Constitution affirmatively requires this benefit.

5. *Obergefell*, 135 S. Ct. at 2597.

6. *Lawrence*, 539 U.S. at 578.

7. *Casey*, 505 U.S. at 856.

I. A New Understanding of Liberty: *Obergefell v. Hodges*

The majority opinion in *Obergefell v. Hodges* is transcendent, and not solely because it recognized the right for same-sex couples to marry. In recognizing this fundamental right, the opinion adopts a commonsense approach to substantive due process that considers the dignity and autonomy of individuals in context. Specifically, *Obergefell*'s vision of liberty clearly outlines the evolution of fundamental rights over time. It dedicates special consideration to the inequality that deprivations of due process impose upon subordinated groups, and acknowledges the critical role of the courts in protecting the rights of the minority from the political will of the majority. In doing so, the Court evinces a fuller understanding of liberty that more adequately addresses the dignity, autonomy, and equality concerns implicated when subordinated groups are denied fundamental rights, and the need to protect these rights from unnecessary government interference.

A. A Common Law Approach to Substantive Due Process

In *Obergefell*, the Supreme Court, in a majority opinion authored by Justice Kennedy, held that, "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty."[8] The Court grounded marriage in the constellation of other fundamental rights protected by the Constitution, including decisions "concerning contraception, family relationships, procreation, and childbearing."[9] The unifying similarity between all of the substantive due process rights—including marriage—the Court reasoned, is that each is "center to individual dignity and autonomy" and necessarily concerns "intimate choices that define personal identity and beliefs."[10]

Beyond recognizing that an individual's autonomy and dignity are at stake in the adjudication of fundamental rights, *Obergefell* updated the doctrine of substantive due process to acknowledge that laws affecting the liberties of particular groups often carry unique stigmatic injuries.[11] In doing so, the Court moved beyond the traditional due process framework of fundamental rights, which typically begins by determining whether the right in question constitutes a fundamental right. Under this approach, a right is fundamental if it has been recognized as so in prior case law or if it is "deeply rooted in this Nation's history and tradition and implicit in the concept of

8. *Obergefell*, 135 S. Ct. at 2604–05.
9. *Id.* at 2599.
10. *Id.* at 2597.
11. *Id.* at 2602.

ordered liberty."[12] If a right is determined to be fundamental, the state cannot infringe upon it unless that infringement is "narrowly tailored to serve a compelling state interest."[13]

In *Obergefell*, Justice Kennedy rejected this framework, instead embracing a common law approach to fundamental rights in which the understanding of tradition evolves with the times.[14] This analysis reflects a reasoned judgment approach to fundamental rights, as first espoused by Justice Harlan in his 1961 dissent in *Poe v. Ullman*,[15] and adopted in *Griswold v. Connecticut*[16] and *Planned Parenthood v. Casey*.[17] Under this approach, the Court must weigh fundamental rights against the governmental interest in a way that recognizes tradition, but also the evolution of that tradition over time.[18] While *Obergefell* emphasized the historical importance of the fundamental right to marriage, the Court noted that the marital institution has not remained stagnant. Specifically, the understanding that "women have their own equal dignity" is a "new dimension[] of freedom" that has become evident to new generations—as women's role and status in society has changed, society's understanding of marriage has evolved also.[19] The institution of marriage has changed from one of coverture, in which the woman had no legal rights or recognition, to a more perfect institution that honors companionship, love, and equal dignity between spouses.[20] In denying same-sex couples this latter understanding of

12. Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (internal citations omitted) (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion) and Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

13. *Washington*, 521 U.S. at 721 (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

14. *Obergefell*, 135 S. Ct. at 2603. Marriage has been recognized as a fundamental right since 1967, when the Court held in Loving v. Virginia, 388 U.S. 1, 12 (1967), that laws prohibiting interracial marriage violated the Fourteenth Amendment Due Process and Equal Protection Clauses. In *Obergefell*, however, the dissenters argued that the right at issue in this case was not "marriage" but whether the Court could alter the definition of the fundamental right to marriage and therefore, the majority should have analyzed the right as if it had not been previously adjudicated as fundamental. *Obergefell*, 135 S. Ct. at 2619 (Roberts, C.J., dissenting). *Id.* at 2642 (Alito, J., dissenting).

15. Poe v. Ullman, 367 U.S. 497, 524–25 (1961) (Harlan, J., dissenting).

16. 381 U.S. at 485–86.

17. 505 U.S. at 845–46.

18. *Obergefell*, 135 S. Ct. at 2598 ("The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.").

19. *Obergefell,* 135 S. Ct. at 2595–97.

20. *Id.* at 2595.

marriage, the Court reasoned, the state was denying same-sex couples not just the fundamental right to marry, but was stigmatizing them and their relationships as lesser than opposite-sex relationships.[21]

B. The Application of Equality Principles to Vindicate Fundamental Rights

In *Obergefell*, the injury that same-sex couples suffered extended beyond a simple lack of access to public benefits that accompany the state's recognition of marriage.[22] The Court paid special attention to the stigmatic injury of marriage equality bans, which embodied public attitudes that same-sex couples were not fit to participate as equal members of the social order.[23] The Court further noted that the stigmatization of gay and lesbian people has not been limited to marriage bans. Rather, there has been a "long history of disapproval" of nonheterosexual people in general.[24] Applying equal protection principles, the Court reasoned that this history of subordination exposed a special cause to be skeptical of the justifications for denying same-sex couples the fundamental right to marry.[25]

Many commentators have criticized the lack of clarity that resulted from the majority's refusal to confine the analysis of marriage equality bans to the doctrinal framework of either substantive due process or equal protection.[26] But the transformative nature of *Obergefell* lies in this deliberate intermingling.[27] Kenji Yoshino coined the term "antisubordination liberty" to describe Justice Kennedy's vision of liberty embraced in *Obergefell*.[28] Antisubordination liberty encompasses

21. *Obergefell,* 135 S. Ct. at 2601–02 ("As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society.").

22. *Id.* at 2604 ("Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them.").

23. *Obergefell,* 135 S. Ct. at 2602.

24. *Id.* at 2604.

25. *Obergefell,* 135 S. Ct. at 2604.

26. *See, e.g.*, Ilya Somin, *A Great Decision On Same-Sex Marriage – But Based On Dubious Reasoning*, WASH. POST (June 26, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/26/a-great-decision-on-same-sex-marriage-but-based-on-dubious-reasoning/.

27. Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 168 (2015).

28. *Id.* at 174.

considerations of dignity, autonomy, *and* equality.[29] Under this principle, substantive due process analysis, i.e., the adjudication of fundamental rights, must acknowledge that government intrusions into the fundamental rights of subordinated groups have the extra adverse effect of propagating inequality.[30] Instead of acting as disparate legal concepts, liberty and equality principles work together and each "leads to a stronger understanding of the other."[31] Thus, the Court's role in substantive due process analysis is to protect those who have traditionally faced discrimination.

Obergefell rolls equal protection analysis into substantive due process analysis in a way that creates a fuller understanding of what it means for the government to deprive a subordinated group of liberty.[32] This principle is actually quite rational: A lack of equal autonomy and dignity inevitably leads to a lack of equality.[33] When equality principles inform fundamental rights analysis, it becomes clear that true equality dictates more than theoretical equal treatment, but rather affirmative protection of historically subordinated groups. In denying same-sex couples the affirmative recognition of their relationships through marriage and the attendant governmental benefits, the government was depriving same-sex couples not just of their autonomy and dignity in making intimate personal decisions relating to family, but also treating them as truly unequal under the law.[34] Therefore, it was not enough to simply afford same-sex couples the ability to participate in relationships.[35] The Court in *Obergefell* took the critical step of extending the public recognition and benefits granted to opposite-sex couples to same-sex couples and treating them as equals. *Obergefell* makes clear that courts should employ equal protection principles to help identify and correct inequalities in the distribution of fundamental rights, thus vindicating liberty for historically subordinated groups under the Constitution.[36]

29. Yoshino, *supra* note 27, at 171–72.

30. *Id.* at 175.

31. *Obergefell*, 135 S. Ct. at 2603.

32. *Id.*

33. *Id.* at 2602.

34. *Id.* at 2604.

35. *See Id.* at 2635 (Thomas, J., dissenting) ("Petitioners cannot claim, under the most plausible definition of 'liberty,' that they have been imprisoned or physically restrained by the States for participating in same-sex relationships. To the contrary, they have been able to cohabitate and raise their children in peace. They have been able to hold civil marriage ceremonies in States that recognize same-sex marriages and private religious ceremonies in all States.").

36. *Obergefell*, 135 S. Ct. at 2604.

C. The Role of the Courts in High-Stakes Politics

The antisubordination principle also counteracts the tyranny of the majority by maintaining a healthy skepticism whenever the political process seeks to limit the autonomy of certain groups. As the stakes of political debate increase, the person or group of people at the center of the controversy are often lost, yet ultimately, they shoulder the burdens. While traditional political processes attempt to resolve issues, individuals can easily be denied equal rights. Oftentimes, these individuals belong to historically subordinated groups and have less political power at the outset. Subjecting individual rights to the will of the majority through the political process is contrary to the Constitution and the doctrine of fundamental rights, as "fundamental rights may not be submitted to a vote" and "they depend on the outcome of no elections."[37]

By the time marriage equality reached the Supreme Court, it was at a critical juncture. After *Lawrence v. Texas*,[38] in which the Supreme Court struck down Texas' antisodomy law, which was used to target gay men, as unconstitutional under the Fourteenth Amendment, marriage equality gained immense support in most states.[39] On the other hand, same-sex couples in some states faced severe backlash. Multiple states took the ultimate step to ban same-sex marriage completely.[40] These politics had become extreme and deprived people in some states of their rights, thereby rendering this group politically powerless.[41] When "sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied."[42] When politics come to this point, the Court is obligated to step in to protect the rights of the powerless group. The result of the political process may well be to extend equal rights to subordinated groups. Nevertheless, when the process acts to

37. *Obergefell*, 135 S. Ct. at 2605–06 (quoting West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 638 (1943)) ("The idea of the Constitution 'was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.'"). *See also* James Madison, Speech in the Virginia Constitutional Convention (Dec. 2, 1829) ("In Republics, the great danger is, that the majority may not sufficiently respect the rights of the Minority.").

38. *Lawrence*, 539 U.S. at 578.

39. William N. Eskridge Jr., *The Marriage Equality Cases and Constitutional Theory*, CATO SUP. CT. REV. 2015-2016 111, 135 (2015).

40. *Obergefell*, 135 S. Ct. at 2593 (citing bans in Michigan, Kentucky, Ohio, and Tennessee); *see also* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (challenge to California's Proposition 8, which amended the California Constitution to ban same-sex marriage).

41. Eskridge Jr., *supra* note 39, at 135. (In the states where same-sex marriage had been outlawed, the political process was "just too strongly stacked against sexual minorities.").

42. *Obergefell*, 135 S. Ct. at 2602.

suppress people's rights, especially those of historically subordinated groups, the stakes have become too high, and the Court must act as a backstop.[43] Equality of the minority should not and cannot be subject to the whims of the majority.

The majority opinion in *Obergefell* articulates a common-sense approach to substantive due process. By adopting a fundamental rights analysis that accounts for the evolution of society's understanding of autonomy and dignity, the special harms to historically subordinated groups when they are denied fundamental rights, and the Court's role to protect individual's rights from the political process, *Obergefell* puts forth a more complete vision of liberty. This vision of liberty can and should extend beyond the context of marriage equality to protect other subordinated groups from government deprivation of fundamental rights.

II. Liberty and Abortion after *Whole Woman's Health v. Hellerstedt*

The comprehensive understanding of liberty in Justice Kennedy's majority opinion in *Obergefell* can light the way to the future legal strategies of abortion rights advocates. A woman's right to decide whether to have an abortion has long been recognized as central to her dignity and autonomy.[44] It has also been recognized as integral to her ability to participate equally in society under the law without being forced into "a particular course of life."[45] In the wake of the Supreme Court's most recent decision affirming a woman's right to abortion, it is time for abortion rights advocates to lay the groundwork for an *Obergefell*-like decision that will definitively guarantee women's autonomy, dignity, and equality with regards to abortion.

A. The Fundamental Right to Abortion

As with the fundamental right to marry examined in *Obergefell*, the right to decide whether to carry a pregnancy to term is deeply rooted in due process jurisprudence. The choice to bear a child is a fundamental right based on the ability of persons to make decisions about family and procreation without undue interference from the state.[46] A woman's decision

43. Eskridge Jr., *supra* note 39, at 134.

44. *See Roe*, 410 U.S. at 153; *Casey*, 505 U.S. at 851; *Lawrence*, 539 U.S. at 565 ("*Roe* recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person.").

45. Eskridge Jr., *supra* note 39, at 119 (quoting JOHN C. HURD, TOPICS OF JURISPRUDENCE CONNECTED WITH CONDITIONS OF FREEDOM AND BONDAGE 44 (1856)); *see also* Planned Parenthood v. Casey, 505 U.S. 833, 856 (1992).

46. *Casey*, 505 U.S. at 874.

whether to carry a pregnancy to term involves "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy" and is "central to the liberty protected by the Fourteenth Amendment."[47] When an abortion restriction has "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion," the government unduly burdens a woman's liberty in violation of the Fourteenth Amendment.[48]

Just as the understanding of the fundamental right to marriage has evolved as women's role and status in society has changed, so has the understanding of the fundamental right to abortion. At the founding of the nation, and through much of the nineteenth century, a woman did not have any legal existence separate from her husband. A woman had no property rights, no right to contract, and no right to sue.[49] According to Blackstone, a legal theorist often cited today in support of a limited view of substantive due process,[50] a woman had no individual dignity or autonomy.[51] Even after the use and acceptance of coverture gradually eroded by the end of the nineteenth century, "invidious sex-based classifications in marriage remained common through the mid-twentieth century."[52] "These classifications denied the equal dignity of men and women."[53] The persistence of the marital rape exemption is a prime example. At common law, a husband could not be liable for raping his wife under the theory that by agreeing to marry, a woman was also agreeing to renounce any control of her body.[54] The purpose of the marital rape exemption was to deny women bodily autonomy in order to subordinate their status to that of men.[55] Beyond the legal consequences, invidious sex-based classifications like the marital rape exemption inflict direct harm upon women's lived experiences. Studies of women's subordinated role in marriage have shown that these

47. *Casey*, 505 U.S. at 851.

48. *Id.* at 877.

49. Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1382 (2000).

50. *See e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2613 (2015) (Roberts, C.J., dissenting). *Id.* at 2632–33 (Thomas, J., dissenting).

51. 1 WILLIAM BLACKSTONE, ESQ., COMMENTARIES ON THE LAWS OF ENGLAND 430 (Leslie B. Adams, Jr. ed., (1983)) (1765) ("a man cannot grant any thing to his wife, or enter into covenant with her: for the grant would be to suppose her separate existence; and to covenant with her, would be only to covenant with himself").

52. *Obergefell*, 135 S. Ct. at 2603.

53. *Id.*

54. Hasday, *supra* note 49, at 1399–1400.

55. *Id.* at 1375.

classifications denied them control of their own bodies and hindered their advancement in social life.[56]

These invidious sex-based classifications, typically based on the common law understanding of a woman's role in the family, have shaped the lives of all women regardless of their marital status. As recently as the 1960s, the Court subscribed to this theory explicitly—regarding women "as the center of home and family life, with attendant special responsibilities that precluded full and independent legal status under the Constitution."[57] Finally, in 1992, the Court in *Planned Parenthood v. Casey* recognized that such views "are no longer consistent with our understanding of the family, the individual, or the Constitution."[58] In striking down a Pennsylvania law that required a woman seeking an abortion to notify her spouse, the Court in *Casey* made clear that the "Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power, even where that power is employed for the supposed benefit of a member of the individual's family."[59] Although women have gained the right to vote, to own property, to contract, and to sue, they still face obstacles in the exercise of their bodily autonomy. Abortion restrictions remain as a poignant vestige of the legacy of coverture and other invidious sex-based classifications, depriving women of their bodily autonomy, dignity, and the ability to participate equally in society.

B. Equality Principles, Women's Subordination, and Abortion Restrictions

Just like the history of subordination of same-sex couples in *Obergefell*, the above-detailed history of women's subordination exposes a special need to be skeptical of the reasons for abortion restrictions. The subordination of women also demands a searching inquiry into the restrictions' effect on the equality of women. Under the antisubordination principle, when evaluating a government intrusion on a fundamental right, the courts must take into account the effect of this intrusion on groups that have traditionally faced discrimination, as the courts would under equal protection analysis. This consideration is even more important in the context of abortion, where the right is not only directly tied to women's autonomy, but also to the sex-stereotype of women as mothers. The Court has observed that in abortion,

56. Hasday, *supra* note 49, at 1406–13.

57. *Casey,* 505 U.S. at 897 (internal quotation marks omitted) (citing *Hoyt v. Florida,* 368 U.S. 57, 62 (1961)).

58. *Id.*

59. *Id.* at 898.

> [T]he liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.[60]

Abortion restrictions have worked to the detriment of women's equality in two distinct ways. First, similar to the bans on same-sex marriage in *Obergefell*, by limiting a woman's right to exercise control over her body and life, abortion restrictions signal to society that a woman is unworthy of equal dignity, propagating historical stereotypes. This stigmatization is in some ways worse than coverture and the marital rape exemption, where a woman's husband deprived her of bodily autonomy. Here, the government is codifying in law or policy the view that women are less worthy of autonomy than men.[61] Moreover, although *Obergefell* turned on dignitary harms, abortion restrictions have quantifiable negative impacts on a woman's life and future. One study, which compared women who wanted an abortion but were unable to obtain one to women who were able to receive one, found that one year later, the women denied an abortion were more likely to be receiving public assistance, were more likely to be living below the federal poverty line, and were less likely to be employed in a full-time job.[62] As the plurality observed in *Casey*, the ability of a woman to

60. *Casey,* 505 U.S. at 852.

61. *See* Lawrence v. Texas, 539 U.S. 558, 575 (2003) (noting that such a declaration "in and of itself is an invitation to subject . . . persons to discrimination both in the public and in the private spheres.").

62. Seventy-six percent of the women denied an abortion were receiving public assistance compared to forty-four percent of women who received an abortion. Diana Greene Foster, Presentation at the American Public Health Ass'n Annual Meeting & Expo: Socioeconomic Consequences of Abortion Compared to Unwanted Birth (Oct. 30, 2012) (https://apha.confex.com/apha/140am/webprogram/Paper263858.html). Forty-eight percent of the women denied an abortion were employed in full-time jobs compared to fifty-eight percent of women who received an abortion. *Id.* Sixty-seven percent of the women who were denied an abortion were below the federal poverty line compared to fifty-six percent who received an abortion. *Id.*; *see also* Ushma D. Upadhyay et al., *The Effect of Abortion on Having and Achieving Aspirational One-Year Plans*, 15 BMC WOMEN'S HEALTH 102 (2015) (finding that women who were able to have an

participate equally in society is facilitated by her ability to make autonomous reproductive health decisions.[63] Studies like this show that the opposite result is also borne out in women's lived experiences: Restrictions on a woman's ability to make autonomous reproductive health decisions impede her ability to participate in society.

The application of equal protection principles and an antisubordination understanding of substantive due process makes it clear that in order for women to achieve equality in society, the courts must ensure protection of their autonomy and dignity. The dignitary and practical harms inflicted upon women by abortion restrictions amount to a denial of equal liberty. These harms are more than enough to constitute an undue burden on a woman's right to abortion as required by current abortion rights doctrine, and furthermore constitute a violation of the principles of autonomy, dignity, and equality generally guaranteed by the Constitution.

C. The Politics of Abortion

Because of the threats posed to both women's liberty and women's equality by abortion restrictions, and because of a movement towards a complete ban on abortion, the current climate demands a resounding declaration of a woman's right to decide whether and when to carry a pregnancy to term.

In June 2016, the Supreme Court held in *Whole Woman's Health* that an abortion restriction is unconstitutional if the burdens that the law places on women seeking an abortion outweigh the benefits to the government.[64] The Court made clear that judges and justices have an obligation to conduct a searching evidence-based inquiry—and thus cannot defer to legislators' claims—into the benefits and burdens of an abortion restriction.[65] The holding was a major victory against the proliferation of Targeted Regulation of Abortion Providers ("TRAP") laws. Under the guise of protecting women's health, TRAP laws specifically target abortion and abortion providers by imposing requirements on them that are more burdensome than those imposed on similar medical procedures and practices.[66] Even though abortion providers are already subject to the same health, safety, and professional regulations as similar providers and health centers, states have

abortion had six times higher odds of having positive life plans—most commonly related to education and employment—and are more likely to achieve them than women denied an abortion).

63. *Casey*, 505 U.S. at 856.

64. 136 S. Ct. at 2300.

65. *Id.* at 2310.

66. CTR. FOR REPRODUCTIVE RIGHTS, TARGETED REGULATION OF ABORTION PROVIDERS (2015), https://www.reproductiverights.org/project/targeted-regulation-of-abortion-providers-trap.

imposed medically unnecessary restrictions on them—such as costly and unnecessary facility modifications—in order to burden women's right to abortion.[67] These regulations, in effect, make it harder or impossible for the providers to remain open and serve patients, while increasing costs and delays. HB 2, the Texas statute struck down in *Whole Woman's Health*, required providers to have admitting privileges at local hospitals and required providers to meet ambulatory surgical center standards.[68] As a result of HB 2, twenty-one out of forty abortion providers in the state of Texas had already closed before the Supreme Court argument, and at least eleven more would have closed—leaving only ten—had the statute not been struck down by the Court.[69] The Court held that "neither of these [HB 2] provisions confers medical benefits sufficient to justify the burdens upon access that each imposes. Each places a substantial obstacle in the path of women seeking a previability abortion, each constitutes an undue burden on abortion access, and each violates the Federal Constitution."[70]

In the wake of *Whole Woman's Health*, the antiabortion movement can no longer hide behind the pretext of protecting women's health to chip away at the right to abortion, nor can they resort to the previously unsuccessful strategy of focusing solely on the fetus.[71] Shortly after the decision in *Whole Woman's Health*, various states abandoned their TRAP laws and abortion rights advocates have brought actions in other states in light of the Supreme Court's ruling.[72] As further evidence of the breadth of the holding in *Whole Woman's Health*, antiabortion advocates have stepped away from promoting TRAP laws as a way to limit abortion access. For example, Americans United for Life—the antiabortion group responsible for drafting Texas's unconstitutional TRAP laws—removed their admitting privileges model bill from their antiabortion model legislation for the 2017 legislative sessions.[73]

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67. NARAL PRO-CHOICE AM., TARGETED REGULATION OF ABORTION PROVIDERS (TRAP) LAWS: DECREASING ACCESS, DRIVING PROVIDERS AWAY (Jan. 1, 2017), https://www.prochoiceamerica.org/wp-content/uploads/2017/01/1.-Targeted-Regulation-of-Abortion-Providers-TRAP-Laws-Decreasing-Access-Driving-Providers-Away.doc.

68. *Whole Woman's Health*, 136 S. Ct. at 2300.

69. *Id.* at 2312.

70. *Id.* at 2300 (internal citations omitted).

71. *See* Siegel, *supra* note 2, at 1716.

72. CTR. FOR REPRODUCTIVE RIGHTS, *2016 STATE OF THE STATES: A PIVOTAL TIME FOR REPRODUCTIVE RIGHTS* (Jan. 2017), https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/USPA_StateofStates_11.16_Web_Final.pdf.

73. *See, e.g.*, AM. UNITED FOR LIFE, ABORTION PROVIDERS' ADMITTING PRIVILEGES ACT: MODEL LEGISLATION & POLICY GUIDE FOR THE 2016 LEGISLATIVE YEAR (2015), ;http://aul.org/downloads/2016-Legislative-Guides/WPP/Abortion_Providers_Admitting_Privileges_Act__2016_LG.pdf; AM. UNITED FOR LIFE, UNSAFE: HOW THE PUBLIC HEALTH CRISIS IN AMERICA'S

After this judicial loss, the antiabortion movement has no choice but to mount an open assault on abortion rights, and they have already begun. Less than two weeks into the 2017 state legislative sessions, forty-six abortion restrictions were introduced.[74] These new bills have a decidedly different focus than the pre-textual and incrementalist laws abounded before *Whole Woman's Health*—they are in both purpose and effect, total bans on abortion. For example, multiple states and the House of Representatives have introduced bills banning abortion as early as six weeks, before many women even know they are pregnant.[75] States are increasingly introducing bans that completely prohibit abortion after twenty weeks and others banning the most common method of later-term abortions.[76] Laws that eliminate insurance coverage of abortion for individuals who receive their health insurance through federal or state Medicaid or other government insurance programs have also proliferated.[77] Thus, the political stakes of abortion have increased as the antiabortion movement begins to promote restrictions that amount to total bans on abortion.

Just as *Lawrence v. Texas* forced a critical juncture in the political debate surrounding marriage equality,[78] *Whole Woman's Health* has similarly brought the political debate surrounding abortion to a head. It is time for the Court to intervene to protect the rights of women in the same way that it did to protect the rights of same-sex couples. To enable this result, abortion rights advocates must end their incrementalist and defensive approach to these unconstitutional bans on abortion. Now is the time for abortion rights advocates to orchestrate an *Obergefell*-like bookend at the Supreme Court, solidifying the equal liberty of women.

After *Obergefell*, substantive due process doctrine no longer tolerates "neutral" laws that have the effect of demeaning the dignity of certain historically subordinated groups. The antisubordination principle requires a more searching inquiry into the motivations of legislators who seek to

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ABORTION CLINICS ENDANGERS WOMEN 202 (2016), (http://unsafereport.org/wp-content/uploads/2016/12/AUL_UNSAFEreport.pdf).

74. Olivia Becker, *At Least 46 Anti-Abortion Bills Are Already In Front of State Legislatures*, VICE NEWS Jan. 12, 2017, https://news.vice.com/story/at-least-46-anti-abortion-bills-are-already-in-front-of-state-legislatures-in-2017.

75. *See* Heartbeat Protection Act of 2017, H.R. 490, 115th Cong. (2017); Ark. Code Ann. §§ 20-16-1301 through 1307 (2013); N.D. Cent. Code § 14-02.1 (2013); H.B. 493, 131st Gen. Assemb. (Ohio 2016).

76. *See* Elizabeth Nash et al., *Policy Trends in the States: 2016*, GUTTMACHER INST. (Jan. 2017), https://www.guttmacher.org/article/2017/01/policy-trends-states-2016.

77. *See* Alina Salganicoff et al., *Coverage for Abortion Services in Medicaid, Marketplace Plans and Private Plans*, KAISER FAMILY FOUND. (Jan. 20, 2016), http://kff.org/womens-health-policy/issue-brief/coverage-for-abortion-services-in-medicaid-marketplace-plans-and-private-plans/.

78. *See supra* Part I.C.

infringe upon the rights of these groups. This type of review challenges the Court to look past several layers of pretext. In passing HB 2, Texas lawmakers used concern for women's health as an excuse to restrict abortion. Moreover, the project of restricting abortion is itself an excuse to obstruct the advancement of women's equal participation in society.[79] The Court in *Whole Woman's Health* invalidated HB 2 by piercing this first layer of pretext. To safeguard abortion rights fully, courts must acknowledge what activists have appreciated for decades: Abortion restrictions are not merely an attempt to regulate a common medical procedure, but are also an avenue for regulating women's liberty writ large.

Application of the formulation of liberty embraced by *Obergefell*—which acknowledges the interrelation of autonomy, dignity, and equality—is the next logical step in abortion jurisprudence.[80] The equality of women demands a resounding rejection of the invidious, discriminatory, and demeaning effects of abortion restrictions on women's lives. Abortion advocates must rise to the challenge and apply proactive pressure to achieve equality.

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79. Similarly, the Texas legislators in *Lawrence v. Texas* used a pre-textual moral justification to ban same-sex sodomy. 123 S. Ct. at 582 (O'Connor, J., concurring). To strike down the law as unconstitutional, the Court was required to recognize both that morality was an insufficient justification and that regulating same-sex sexual relations was a method of regulating gay and lesbian people as a group—"demean[ing] their existence." *See also Id.* at 578.

80. Justice Kennedy's understanding of liberty in *Obergefell* is instructive because he remains the center of the Court on abortion. Yet some critics are skeptical of Justice Kennedy's commitment to applying an evolved standard of substantive due process to abortion rights, given his majority opinion in *Gonzalez v. Carhart*, in which he relied upon paternalistic views of women to uphold a ban on a method of later abortion. Gonzalez v. Carhart, 550 U.S. 124, 168 (2007). Specifically, he relied on an unsubstantiated assumption that "some women come to regret their choice . . . ." *Id.* at 159. While it is likely difficult for abortion rights advocates to place their hopes in a Justice who has echoed some of the very justifications used to subordinate women, both Justice Kennedy's understanding of liberty and the legal landscape surrounding the Fourteenth Amendment have changed since *Carhart*.

Notably, Justice Kennedy's opinion in *Obergefell* firmly embraces the reasoned judgment approach to substantive due process, in which fundamental rights are permitted to evolve with tradition. *Obergefell*, 135 S. Ct. at 2598. Under this approach, and taking into the account the continued advancement of women in society, the gender paternalism in *Carhart* clearly is no longer a valid justification to restrict abortion.

Not only has society evolved past acceptance of gender paternalism as justification for restricting women's autonomy, but such restrictions are also wholly antithetical to the antisubordination view of liberty animating the reasoning of *Obergefell*. Although he fell prey to the pre-textual justifications proffered for a restriction on abortion in *Carhart*, Justice Kennedy joined the majority in *Whole Woman's Health*, which saw through these justifications for what they were: pretext for limiting the right to abortion. Admittedly, the line from *Roe* and *Casey* through to *Whole Women's Health* has not been one of unbroken progression; *Carhart* represents a stumbling block. Yet "liberty must not be extinguished for want of a line that is clear." *Casey*, 505 U.S. at 869.

III. Fulfilled Due Process: Justice Thomas' Dissent in *Obergefell* and its Application to Public Insurance Coverage of Abortion

It is true that abortion rights advocates have long emphasized the importance of fundamental abortion rights to a woman's dignity, autonomy, and equality. *Obergefell* provides a more organized framework for these arguments. It also suggests that equal protection concerns should undergird and strengthen claims of substantive due process in abortion jurisprudence. Yet *Obergefell*'s vision of liberty does much more. In his dissent, Justice Thomas interpreted the majority's decision in the case as a sharp break from history: "In the American legal tradition, liberty has long been understood as individual freedom *from* governmental action, not as a right *to* a particular governmental entitlement."[81] Nevertheless, *Obergefell* does require affirmative government action. States must not only affirmatively recognize same-sex marriages, but they also must grant these couples the attendant government benefits.[82]

Under Justice Thomas' understanding, the Fourteenth Amendment Due Process Clause cannot require any such affirmative government action.[83] The majority in *Obergefell* could have avoided this conflict by analyzing the same-sex marriage bans under the Fourteenth Amendment's Equal Protection Clause. Under Equal Protection, the Court can remedy inequalities in benefits, not just rights.[84] The majority could have held that denying marriage on the basis of sexual orientation violated the Equal Protection Clause.[85] Nevertheless, Justice Kennedy did not rely on this reasoning, instead choosing to analyze same-sex marriage bans in terms of liberty and the Due Process Clause. In doing so, he recognized that sometimes, to "achieve the full promise of liberty,"[86] the government must grant affirmative rights to historically subordinated groups.[87] Under this view, the Constitution not only guarantees fundamental rights and equal protection under law, but also their synergy. Thus, the State must affirmatively facilitate subordinated groups' exercise of their rights to foster true equality.

In the context of abortion, the State does not and cannot fulfill due process as long as it denies coverage for low-income women who are eligible

81. *Obergefell*, 135 S. Ct. at 2634 (Thomas, J., dissenting) (emphasis in original).
82. *Id.* at 2635–36.
83. *Id.* at 2636.
84. Yoshino, *supra* note 27, at 168.
85. *Id.*
86. *Obergefell*, 135 S. Ct. at 2600.
87. *Id.* at 2602.

for Medicaid. While the *Obergefell* formulation of liberty is helpful in shoring up constitutional arguments against other types of abortion restrictions, it is potentially revolutionary in the context of requiring Medicaid coverage of abortion for low-income women, restrictions on which have been particularly difficult for abortion rights advocates to overcome. In 1976, Congress passed the Hyde Amendment, a rider attached to an annual appropriations bill which prohibits federal Medicaid coverage of abortion care except in very limited circumstances.[88] In 1980, the Supreme Court upheld the constitutionality of the Hyde Amendment in *Harris v. McRae*.[89] The Court reasoned that the Hyde Amendment's funding restrictions did not infringe upon a woman's liberty interest protected by the Fifth Amendment Due Process Clause:

> [A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation . . . . The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency.[90]

While some state courts have held that state funding restrictions—like those in the Hyde Amendment—violate state constitutional principles,[91] the Amendment and *McRae* have created a lasting two-tiered system of fundamental rights in which *the government* denies a group of women their right to abortion simply because of their income. In fact, this was the purpose of the Hyde Amendment. Representative Henry Hyde admitted during debate that he was specifically targeting low-income women simply because they were within his reach: "I certainly would like to prevent, if I could legally, anybody having an abortion, a rich woman, a middle-class woman, or a poor woman. Unfortunately, the only vehicle available is the . . . Medicaid bill."[92]

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88. Pub. L. No. 96–123, § 109, 93 Stat. 926 (1976).

89. 448 U.S. 297, 317 (1980).

90. *Id.* at 316.

91. *See* State v. Planned Parenthood of Alaska, 28 P.3d 904 (Alaska 2001); Simat Corp. v. Ariz. Health Care Cost Containment Sys., 56 P.3d 28 (Ariz. 2002); Doe v. Maher, 515 A.2d 134 (Conn. Super. Ct. 1986); Humphreys v. Clinic for Women, Inc., 796 N.E.2d 247 (Ind. 2003); Moe v. Sec'y of Admin. & Fin., 417 N.E.2d 387 (Mass. 1981); Women of the State of Minn. v. Gomez, 542 N.W.2d 17 (Minn. 1995); Right to Choose v. Byrne, 450 A.2d 925 (N.J. 1982); New Mexico Right to Choose/NARAL v. Johnson, 975 P.2d 841 (N.M. 1998); Planned Parenthood Ass'n v. Dep't of Human Res., 663 P.2d 1247 (Or. Ct. App. 1983), *aff'd on statutory grounds*, 687 P.2d 785 (Or. 1984); Women's Health Ctr. v. Panepinto, 446 S.E.2d 658 (W. Va. 1993).

92. 123 CONG. REC.19,700 (1977) (statement of Rep. Henry Hyde).

The Hyde Amendment and similar denials of funding place an often insurmountable barrier in the way of a low-income woman seeking an abortion. Seventeen percent of women were enrolled in Medicaid as of 2015,[93] and previous studies indicate that up to one in four women who qualify for Medicaid are forced to carry a pregnancy to term because they are unable to secure funding for an abortion.[94] Others are forced to delay the procedure while they raise funds, increasing both health risks to the women and the cost of the procedure.[95] Regardless of the cause, when women are denied an abortion they are more likely to be forced further into poverty, creating a vicious cycle for them and their families.[96] The Hyde Amendment and similar restrictions also produce well-documented, disparate impacts on women of color.[97]

These unjust realities support various convincing arguments for overturning funding restrictions.[98] Now, under *Obergefell* and *Whole Woman's Health*, the antisubordination theory of liberty explicitly requires the courts to examine these realities as evidence of the lack of equal treatment created by government infringement upon fundamental rights.[99] As in *Obergefell*, the harm to a woman's dignity alone should be enough to show that these funding restrictions pose an undue burden on the right to abortion. However, unlike typical abortion restrictions that can be remedied simply by striking the statute, the remedy for funding restrictions requires affirmative action by the state.

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93. KAISER FAMILY FOUND., *Women's Health Insurance Coverage* (Oct. 21, 2016), http://kff.org/womens-health-policy/fact-sheet/womens-health-insurance-coverage-fact-sheet/.

94. Stanley K. Henshaw et al., *Restrictions on Medicaid Funding for Abortions: A Literature Review*, GUTTMACHER INST. (June 2009), https://www.guttmacher.org/sites/default/files/report_pdf/medicaidlitreview.pdf.

95. *Id.*

96. *See* Foster, *supra* note 62; Upadhyay, *supra* note 62.

97. *See* Jessica Arons & Lindsay Rosenthal, *How the Hyde Amendment Discriminates Against Poor Women and Women of Color*, CTR. FOR AM. PROGRESS (May 10, 2013), https://www.americanprogress.org/issues/women/news/2013/05/10/62875/how-the-hyde-amendment-discriminates-against-poor-women-and-women-of-color/.

98. *See* Jill E. Adams & Jessica Arons, *A Travesty of Justice: Revisiting Harris v. McRae*, 21 WM. & MARY J. WOMEN & L. 5 (2014).

99. Although funding restrictions of abortion coverage do not affect all women seeking an abortion, this is irrelevant in the constitutional analysis. In *Casey*, the Court noted that "[l]egislation is measured for consistency with the Constitution by its impact on those whose conduct it affects . . . . The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Casey*, 505 U.S. at 894. Thus, the only group relevant in the adjudication of funding restrictions is the Medicaid-eligible women affected by the ban. This proposition was reaffirmed by the Court in 2015, in *City of Los Angeles v. Patel*, which held that the proper focus of a facial challenge is on the applications of the statute that actually authorizes or prohibits the conduct in question. City of L.A. v. Patel, 135 S. Ct. 2443, 2451 (2015) (citing *Casey*, 505 U.S. at 894).

Obergefell supplies the critical piece of the legal argument to overturn *McRae* and invalidate restrictions on public insurance coverage of abortion. The vision of liberty embraced in *Obergefell* requires affirmative, positive action by the government to remedy unequal treatment and the harm it has created. In *Obergefell*, a historically subordinated group—same-sex couples—was granted not just access to the fundamental right to marry, but also to the governmental benefits associated with marriage. Without this final step, same-sex couples could not truly exercise their fundamental rights and as a result, their liberty would have remained unfulfilled and their dignity demeaned. Likewise, funding restrictions prevent low-income women from achieving the "full promise of liberty."[100] Fulfilled due process dictates that the historically subordinated group—women—be granted public coverage of abortion.[101] Without it, these women truly cannot exercise their fundamental rights, and the Constitution's dual promises of liberty and equal dignity will remain out of reach.

Conclusion

Without intervention, the political process will threaten the fundamental rights of subordinated groups, as it is likely that the majoritarian process will underrepresent and underserve the needs of those who lack political power. Although many opponents of substantive due process criticize the doctrine for expanding society's understanding of fundamental rights, in many ways this expansion of "liberty" has served as a structural countermeasure to the deficiencies of legislative politics. The reasoning of *Obergefell* adds the right to equal dignity to the freedoms previously safeguarded by the Due Process Clause—recognizing the special need for the protection of historically subordinated groups. In doing so, the Court acknowledged the true purpose of the Fourteenth Amendment: to truly protect the autonomy, dignity, and equality of all people. Sometimes, that requires the Court to show special solicitude to those unable to see their rights vindicated through more traditional political processes.

As a result, historical stereotypes and technicalities of legal doctrine need no longer stand between a woman and her equitable place in society. Recent decisions have revealed a Court that is willing to see through purportedly neutral laws which in effect perpetuate invidious discrimination and subordination. In *Obergefell*, the Court recognized that "traditional marriage" was a poor justification for classifying an entire group as social

100. *Obergefell*, 153 S. Ct. at 2600.

101. Especially when considering the unique subordination public insurance coverage restrictions inflict on low-income women.

outcasts.[102] In *Whole Woman's Health*, the Court understood that "protecting women's health" did not justify violating women's autonomy.[103] Similarly, the Court may soon have occasion to condemn the Hyde Amendment and similar restrictions for what they really are: retrograde attempts to force lower-income women into the State's "own vision of the woman's role."[104] As Justice Thomas' correctly observed, the majority's opinion in *Obergefell* opened the door for the Court to require the government to remedy this gross inequality of its own creation. And through that door, the government must now pass, for the sake of the most marginalized women of our society. There is no reason for such injustice to continue any longer. This Article laid out a new legal strategy and abortion rights advocates are well advised to embrace the theories of antisubordination liberty and fulfilled due process in their quest.

102. *Obergefell*, 153 S. Ct. at 2600.

103. *Whole Woman's Health*, 136 S. Ct. at 2300.

104. *Casey*, 505 U.S. at 852.

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